



This issue of the Baltic Competition Law Insight covers news regarding current hot topics in competition law in Estonia, Latvia, and Lithuania.

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## Estonia: paradigm shift in public enforcement

Estonia is on the verge of potentially seismic changes in competition enforcement. So far, penalties for competition law infringements could be imposed only in criminal or misdemeanour proceedings. Cartels could be sanctioned only by criminal courts. While criminal proceedings gave the Estonian Competition Authority a number of useful tools in discovering cartels – e.g., covert surveillance – the enforcement system has been complex, resulting in a relatively low level of competition enforcement in Estonia.

Now, Estonia needs to transpose ECN+ Directive, which requires that the local enforcement authorities have a power to impose effective, proportionate and dissuasive fines in their own non-criminal proceedings.

Draft document transposing the ECN+ Directive was published by the Ministry of Justice for public consultation at the end of 2021. Consultation on the draft is ongoing. Based on public feedback, many stakeholders have indicated concerns with the draft, in particular related to a significant alleviation of the burden of proof for the Estonian Competition Authority in identifying and penalising competition law infringements. Many objections result from the

requirements of the ECN+ Directive sitting uncomfortably with the nature of the Estonian legal system. Thus, it remains to be seen whether the draft will be adopted by 1 July 2022, as currently planned.

The central features of the transposition of ECN+ Directive, based on the current bill, are the following:

- Criminal penalties on cartels and misdemeanour penalties for abuse of dominance position will be abolished and replaced by administrative fines that can be imposed by the Estonian Competition Authority;
- There will be no personal liability for competition infringements, only undertakings will be liable;
- The maximum fine can be up to 10% of the worldwide turnover of the undertaking;
- New and separate administrative competition infringement proceedings will be introduced. The procedural rights and obligations of the persons caught up in these proceedings will be very different from the current system. Now, in criminal proceedings, suspects and the accused have the right not to give testimony and to remain passive throughout the proceedings. In administrative proceedings, undertakings will have the obligation to cooperate and provide evidence. Failure to do so may result in procedural fines of up to 5% of daily turnover. The right against self-incrimination will become much more limited.

The deadline for the transposition of ECN+ Directive passed already a year ago. Thus, the Ministry of Justice wishes to complete the current consultation round as soon as possible. It remains to be seen whether the Government of Estonia will be satisfied

with the current draft and forward it to the Parliament for adoption.

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## Latvia: more opportunities for leniency and convergence of fining rules

Latvian transposition of the ECN+ Directive is in the final stages of the legislative process. Adoption of amendments to the Competition Act is expected in the coming month or two. In addition to institutional changes that will result in almost complete exemption of the Competition Council from the hierarchy of the civil service, and cross-border cooperation rules that will facilitate the execution of assistance requests received from other EU competition authorities, the amendments will expand the leniency programme and affect the calculation of fines.

Scope of the leniency programme, i.e., the opportunity to self-report an infringement in exchange for immunity from or reduction of fine, will be expanded. Currently only secret cartels can be tipped off in a leniency application. After amendments all cartel agreements and also the vertical agreements that concern resale price maintenance and restrictions of passive sales will be notifiable. Leniency programme was introduced 24 years ago and, according to the Competition Council, by late 2021 only 8 infringements had been discovered via this route. Inclusion of vertical agreements in the leniency programme is likely to result in significantly more self-reporting.

The maximum permitted amount of various fines will be increased. Notably, as concerns vertical agreements and abuses of dominant position that affect trade between EU Member States, the cap will be increased from 5% to 10% of undertaking's annual turnover. Whether or not the rates actually imposed will increase is an open question; the Latvian Competition Council already tends to inflict penalties that are more severe, in relative terms, than the fines imposed in other EU countries. Non-compliance with interim measures (i.e.,

obligations imposed on an undertaking while an investigation is ongoing), remedies (i.e., obligations imposed on an undertaking to bring the infringement to an end) or commitments (i.e., obligations assumed by an undertaking in exchange for closure of investigation) will result not only in periodic penalty payments, a tool already available to the authority, but also in a lump-sum fine. The latter will be capped at 3% of annual turnover. Finally, where an infringement of EU competition law by an association of undertakings relates to the activities of its members', the fine will be calculated on the basis of the turnover of each member active on the market affected by the infringement. This will mark a departure from the existing decisional practice where the authority often levies fines on associations' own modest, membership fee-based turnovers.

The amendments may also lead to an overdue recognition that, for fining purposes, the value of the undertaking's sales related to the infringement is highly relevant. In that regard Latvian law diverges from the prevailing practice in the EU. As a general rule, a fine is calculated on the basis of undertaking's total turnover, but the value of sales on the market of infringement is taken into account only if it is less than 10% of total turnover. The amendments, once adopted by the Parliament, will trigger a review of Government's technical regulation on the calculation of fines. This will be an opportunity to eliminate the long-standing discrepancy with other EU jurisdictions.

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## Lithuania: Competition Council's priorities for 2022 / e-commerce monitoring

Four sectors — labour market, health, traditional retail, and e-commerce — have been identified as priorities for the Lithuanian competition authority in 2022. This means that these sectors are likely to receive increased attention in the authority's enforcement activities and also merger review (including concentrations not

subject to mandatory notification), legislative initiatives, and market inquiries.

The labour market 'sector' seems distinct from the remaining priorities, since it is not an economic sector in the usual sense, but a universally relevant input. That being said, some sectors are more sensitive to the labour market than others, particularly talent-driven sectors such as IT, sports, the liberal professions and similar, or sectors currently experiencing labour shortages. It remains to be seen whether the focus on the labour market will mean more for such sectors than for others.

It is difficult to tell in what ways exactly the labour market will receive attention from the competition authority. Traditionally competition law was significant to the labour market mostly in the context of prohibition of anticompetitive agreements, such as non-poaching or wage-fixing. Investigations of such nature have already been conducted by national competition authorities in the Netherlands (hospital staff), UK (fashion models), Spain (freight forwarding, hairdressers). However, it is less clear whether the authority's focus on the labour market will have any effect on its other functions, such as merger control (perhaps we will see assessments of effects of a merger to the labour market) or legislative initiatives.

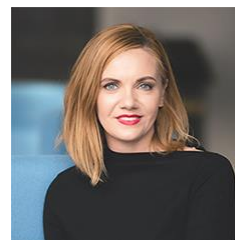
Another priority sector is traditional retail, which has garnered attention for two reasons: recent enhancements to relevant sectoral legislation, resulting from transposition of Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, and upcoming changes to European Commission's vertical block exemption regulation. Under the enhanced sectoral legislation, which i.e., protects suppliers from unfair trading practices by large retail chains, the competition authority will now be able to impose significant fines (up to 0.7% of annual turnover) and enjoy more procedural powers (such as the ability to conduct dawn raids). These recent changes are relevant to the large retail chains, since only they may be liable under this legislation. By contrast, the upcoming changes

to the vertical block exemption regulation are of concern to both parties. A retailer and a supplier alike may be liable for anticompetitive clauses in vertical agreements. If any safe harbour is removed when the new block exemption comes into force in June, suppliers should also take note.

The two remaining priority sectors, health and e-commerce, have been spotlighted by the authority in

part due to global trends (the global pandemic and growth of e-commerce), and in part due to their national characteristics. The competition authority indicates that it intends to participate more actively in developing the health sector legislation. Regarding e-commerce, the Lithuanian competition authority together with the Latvian authority recently initiated a sector inquiry into online marketplaces to learn more about its mechanisms, as well as identify any competition risks. If any competition restrictions are identified, there is a high risk that the Lithuanian and Latvian authorities could launch investigations into possible infringements of competition law. Finally, both sectors comprise a significant number of small businesses which frequently fall below the thresholds for mandatory merger filings. It seems possible that ex post merger control may become an additional tool with which the competition authority will pursue its policy in these sectors.

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